STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMY BAUGH,

Defendant-Appellant.

UNPUBLISHED
October 28, 2004

No. 247548
Wayne Circuit Court
LC No. 02-008915

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

The victim in this case was a disabled forty-three-year-old man who lived with his father in Detroit. One evening, the victim rode his bicycle to a nearby convenience store to purchase beer. On his way home from the store, he was shot twice and died at the hospital. Near his bicycle, the police found $29 and a bag that contained a broken beer bottle.

Robert Kwanniewski, who is also known by several aliases, was with defendant on the day the victim was killed. Kwanniewski testified that he stole a Jeep Cherokee and returned to his home in Hamtramck, where defendant approached him with the idea to rob someone. Defendant, who was armed with a .22 pistol, needed $100 because he was short on rent. Kwanniewski claimed that he and defendant drove around, robbed one man, and spent the $50 proceeds on drinks, cigarettes, and drugs.

Kwanniewski claimed that defendant saw the victim in the instant case that evening, and they followed him away from a convenience store. Kwanniewski claimed that he cut the victim off with the Jeep and defendant approached the victim, demanding money. Because the victim did not cooperate, defendant shot him in the right hip, and the victim threw $29 at defendant. Kwanniewski became nervous because a vehicle was approaching, and he tried to hurry defendant. Defendant shot the victim again, this time in the left chest, and he returned to the

Jeep without picking up the money. While they were driving away, defendant fired two gunshots at the approaching vehicle, which then ceased to follow them.

While incarcerated on other charges, defendant approached the police and made a statement, in which he admitted that he, Kwanniewski, and two other friends had stolen a Jeep on the day in question. Defendant asserted that he was a backseat passenger in the Jeep when Kwanniewski spotted the victim and they stopped the Jeep. According to defendant, Kwanniewski shot the victim twice because he failed to cooperate with a robbery attempt. Defendant did not remember the victim riding a bicycle.

Defendant and Kwanniewski were arrested the following day for an unrelated carjacking. Kwanniewski spoke with the police several days after the arrest, but he did not implicate defendant and did not discuss the instant case. Several months later, defendant sent a letter to the police, requesting a meeting. Defendant discussed the instant case with an officer and made the above-mentioned statement, in which he implicated Kwanniewski. Both defendant and Kwanniewski were then charged with first-degree felony murder.

The trial court conducted a preliminary examination, but only bound Kwanniewski over for trial. Kwanniewski entered into a plea agreement with the prosecution, whereby he pleaded guilty to a reduced charge of second-degree murder in exchange for the dismissal of three unrelated stolen car cases. Kwanniewski also entered into a sentencing agreement, which provided that he serve 18-40 years instead of 270-450 months in prison.

Defendant asserts that he should have been allowed to submit evidence of Kwanniewski's prior assault convictions to rebut his "perjurious" testimony that he was non-violent and a law-abiding citizen. The decision to admit evidence is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo. *Id*. at 670-671.

In *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985), the Supreme Court held that evidence of a prior conviction of the defendant for assault with intent to rob while armed was admissible to rebut his testimony that he became hysterical at the sight of a gun being pointed at him. *Id*. at 411-413, 415-420. The Supreme Court said that although the evidence was not admissible under MRE 609, it was admissible to rebut specific testimony of the defendant. *Id*. at 415. Specifically, the Supreme Court held:

> It remains within the trial court's discretion to admit at any time during the course of a trial evidence of prior convictions, notwithstanding a ruling to exclude such evidence under MRE 609, if it is being offered for some proper purpose other than to impeach a defendant's credibility in general. For instance, evidence of prior convictions is always admissible to show perjured testimony of the [witness] regarding the existence or nature of prior convictions. [*Taylor, supra* at 414.]

Defendant argues that Kwanniewski opened the door for impeachment and the jury was left with the impression that he was a "law abiding citizen" based on the following testimony during Kwanniewski's direct examination: "I'm not goin' to, you know, try to run nobody over.

So, I cut [the victim] off for [defendant]" and, "Too much traffic. You know, I ain't wanted to get scene [sic] myself doing nothin' because that ain't me." We conclude that Kwanniewski's remarks did not open the door for impeachment. There is no evidence that Kwanniewski has a prior conviction for vehicular homicide. Additionally, Kwanniewski's remark, "that ain't me," appears to refer to his preference not to be discovered at the scene of a crime he has committed.

Moreover, after reviewing Kwanniewski's testimony in its entirety, we conclude that the jury was not left with the impression that he was a law-abiding citizen. During direct examination, he admitted that he used an alias to avoid criminal responsibility and that he had pleaded guilty to second-degree murder. Kwanniewski had no qualms in "riding out" to commit an armed robbery or "stick-up" with defendant. During cross-examination, Kwanniewski admitted that he had been convicted of crimes involving theft or dishonesty. Although Kwanniewski first denied that he was an armed robber because he used a screwdriver to accomplish his crimes, Kwanniewski was impeached with his preliminary examination testimony. When Kwanniewski resisted stating the words, "Yes, I'm an armed robber," trial counsel persisted, and Kwanniewski admitted his earlier statement. As such, by the time Kwanniewski first stated that he was a "non-violent" person, defense counsel had already established Kwanniewski's violent character and failure to abide by the law.

In addition to acknowledging that he was an armed robber, Kwanniewski admitted during cross-examination that he used three aliases to avoid criminal responsibility. The jury heard Kwanniewski admit that he was arrested for an unrelated carjacking and that he and defendant had committed another robbery on the same day as the instant offense. Kwanniewski also testified that he and defendant were looking for a person named "Leo," who was "making trouble" for defendant's "lady friend." Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). A witness' credibility may be impeached with prior convictions if the evidence has *significant probative value* on the issue of credibility . . . ." *People v McDaniel*, 256 Mich App 165, 168; 662 NW2d 101 (2003) (emphasis added). In light of Kwanniewski's admission to being an armed robber and his involvement in a carjacking and a murder, the jury more than likely had already determined that he was violent. We therefore conclude that by the time defendant requested to introduce evidence of Kwanniewski's prior assault convictions, the evidence would have been non-probative and cumulative.

Next, defendant argues that the trial court erred in providing an aiding and abetting jury instruction because the prosecutor's theory only supported that defendant was a principal, not an aider or abettor. Defendant further asserts he was "ambushed" by the prosecution when it presented a different theory in closing arguments. This Court generally reviews de novo claims of instructional error. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

> A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. When a [party] requests a jury instruction on a theory or

> defense that is supported by the evidence, the trial court must give the instruction . . . . The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative. [*People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002) (citations omitted).]

An aiding and abetting instruction is warranted if there is evidence that the "(1) the crime charged[1] was committed by *the defendant* or some other person, (2) *the defendant* performed acts or gave encouragement that assisted the commission of the crime, and (3) *the defendant* intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999) (emphasis added). See also MCL 767.39. "Aiding and abetting" describes all forms of assistance made available to the perpetrator of a crime and includes all words or deeds that might support, encourage, or incite the commission of a crime. *Carines, supra* at 757. "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992).

Contrary to defendant's assertion, he was not "ambushed" by the prosecution with a different theory during closing arguments. The prosecution never relied on a theory that defendant acted independently. Specifically, the prosecution, in its opening statement, asserted the following theory:

> Let me make this clear right from the beginning, it's the People's position in this case that both [defendant] and [Kwanniewski] are equally liable for this event. They're equally guilty of what we call first-degree felony murder. They aided and abetted and helped one another out in this crime. They're equally liable.
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> We submit that we will prove to you that on the evening of December 3, 2001 both Robert Kwanniewski and [defendant] aiding and abetting and helping out one another, committed felony murder, larceny, even though they really didn't get anything. . . .

More importantly, the plain language of MCL 767.39 allows a defendant who directly or indirectly commits an offense to be considered as an aider and abettor. Here, if the jury believed Kwanniewski's version of events, Kwanniewski drove the stolen Jeep and defendant fired the

[1] The elements of first-degree felony murder include "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death of great bodily harm with knowledge that death of great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the felonies specifically enumerated in the felony-murder statute." *People v McCrady*, 244 Mich App 27, 30-31; 624 NW2d 761 (2000).

gun that killed the victim. They worked as a team. Alternatively, the jury could have rejected Kwanniewski's assertion that defendant was the shooter. The trial court did not err in providing the aiding and abetting jury instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Defendant alleges that the prosecution's improper remarks during closing and rebuttal arguments constitute prosecutorial misconduct. Because defense counsel failed to object to these comments, this issue has not been properly preserved for appeal. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To avoid forfeiture of the issue defendant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *Carines, supra* at 763. We will only reverse defendant's convictions if he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks or conduct in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham, supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant asserts that the prosecution improperly denigrated defendant when it argued that defendant was "clever, deceitful, devious" and engaged in "'trickeration' and blame-shifting." Generally, a prosecutor is permitted to argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). During his closing argument, a prosecutor is permitted to remark about the credibility of a witness, particularly when conflicting testimony exists. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, the prosecution must refrain from denigrating a defendant with intemperate and prejudicial remarks. *Bahoda, supra* at 283.

After reading the prosecution's comments in context, we conclude that the evidence supports the prosecution's remarks. During his opening statement, defense counsel suggested that defendant's police statement was given at the officer's behest and under her direction where she suggested the facts that defendant should include in the statement. When defendant contacted the police, he implicated Kwanniewski as the shooter and presented himself as a mere passenger in the vehicle. Furthermore, the details of defendant's statement did not match the physical evidence. Specifically, defendant indicated that the victim was walking and he never saw a bicycle. As such, defendant has failed to establish plain error because his false information could be reasonably interpreted as (1) an effort to send the police on a "wild goose chase" as the prosecution argued, (2) deceitful, (3) blame-shifting, and (4) "trickeration." Therefore, while the prosecution could have characterized the evidence in a different light, "[a] prosecutor need not state arguments in the blandest possible terms." *People v Matuszak*, 263 Mich App 42 ; ___ NW2d ____ (Docket No. 244817, issued July 13, 2004), slip op, p 18, citing *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant also challenges the prosecution's comment that Kwanniewski did not get a "sweetheart deal." During his opening statement, defense counsel essentially stated that Kwanniewski was motivated to lie in exchange for a significantly reduced sentence. The jury heard two conflicting versions of events. It was therefore reasonable that the prosecution, consistent with its theory, would argue that the jury should not discount Kwanniewski's testimony based on the plea agreement because he did not receive immunity or a significantly reduced sentence. A prosecutor must argue the evidence and is free to argue all reasonable inferences from the evidence relating to the prosecution's theory of the case. *People v Reed,* 449 Mich 375, 398-399; 535 NW2d 496 (1995); *Matuszak, supra*, slip op at 15, citing *People v Knowles,* 256 Mich App 53, 60; 662 NW2d 824 (2003). After reading the prosecution's remarks in context, we conclude that they address the details of Kwanniewski's plea agreement, which were adequately presented to the jury at trial.

Defendant next asserts that the prosecution improperly vouched for Kwanniewski's credibility. The prosecution cannot vouch for the credibility of its witnesses to the effect that it has some special knowledge concerning a witness' truthfulness. *Bahoda, supra* at 276. A prosecutor is permitted to argue from the evidence that a witness is worthy or not worthy of belief. *Launsburry, supra* at 361. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Jones*, 468 Mich 345, 353; 672 NW2d 376 (2003); *Schutte, supra* at 721. The prosecution's comments were made in rebuttal to defense counsel's closing argument. The prosecution did not assert its personal belief in Kwanniewski's credibility beyond the scope of the evidence presented at trial, and did not imply that it had some special knowledge of his truthfulness. Accordingly, we conclude that the prosecution's remarks do not constitute outcome-determinative plain error. *Carines, supra* at 763.

Moreover, this Court will not find any error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra* at 721. If defense counsel had raised the issue at trial, any error could have been cured by a timely instruction. *Id.* The trial court instructed the jury that the lawyers' statements and arguments are not evidence. Absent an objection, the "judge's instruction that arguments of attorneys are not evidence dispelled any prejudice[,]" and the jury is presumed to follow the court's instructions *Id.* at 721-722, quoting *Bahoda, supra* at 281; *People v Lueth,* 253 Mich App 670, 687; 660 NW2d 322 (2002).

In his supplemental brief on appeal, defendant argues that he was denied effective assistance of counsel. Because defendant failed to file a motion for new trial or request a *Ginther*[2] hearing, the issue of effectiveness of counsel has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to

[2] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

effective assistance of counsel. *Id.* A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

First, defendant alleges that trial counsel was ineffective for failing to object to Kwanniewski's or the police officer's hearsay testimony about defendant's statement with regard to the crime. The U.S. Supreme Court recently held that testimonial evidence may only be admitted if the declarant is unavailable and there was a prior opportunity for cross-examination. *Crawford v Washington*, 541 US ___; 124 S Ct 1354, 1374; 159 L Ed 2d 403 (2004). Because the challenged statements were not made before a grand jury, at a preliminary examination or trial, or during police interrogation, they are not testimonial in nature. *Id.* Thus, they are not barred by the Confrontation Clause. *Id.* Because any such hearsay objection would have been futile, this claim of ineffective assistance of counsel is meritless. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also alleges that trial counsel was ineffective for failing to object to the testimony of Kwanniewski and his attorney with regard to Kwainniewski's plea bargain because such testimony constitutes hearsay under *Crawford*. Because Kwanniewski testified at trial and was subject to cross-examination, defendant's reliance on *Crawford* is misplaced. *Crawford, supra*, 124 S Ct 1374. Because any such hearsay objection would have been futile, this claim of ineffective assistance of counsel is also meritless. *Milstead, supra* at 401.

For the first time on appeal, defendant contends that trial counsel was ineffective for failing to object to evidence of "other uncharged crimes" under MRE 404(b). Although defendant fails to articulate the uncharged crimes to which he refers, we assume that he challenges introduction of the evidence that he was arrested for an unrelated carjacking the day after the victim was killed. In lieu of having the arresting officer testify, defense counsel and the prosecution stipulated that defendant was arrested.

To establish a claim of ineffective assistance of counsel, a defendant must show that "his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *Toma, supra*, at 302-303. Under this standard, defendant must show that, if defense counsel had objected to admission of evidence that defendant had been arrested for the unrelated carjacking, the trial court would have excluded the evidence and he would have been acquitted of the charges. Given that Kwanniewski presented extensive testimony about defendant's involvement in the murder and defendant admitted to the police that he was in the stolen Jeep when the victim was killed, we conclude that there is no reasonable probability that the verdict would have been any different if counsel had objected to introduction of the evidence of defendant's arrest.

Finally, defendant argues that, when the aforementioned alleged hearsay evidence is excluded, the verdict was against the great weight of the evidence. Because we have concluded

that none of the statements identified by defendant constituted hearsay, we need not address this issue.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage